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No. 90-626

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

PACIFIC LIGHTING CORPORATION,
FREDRICKS DEVELOPMENT CORPORATION, and
DUNN PROPERTIES CORPORATION,

Petitioners,

v.

MGW, INC.,

Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT

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I. INTRODUCTION.

This case does not belong here. Petitioners Dunn Properties Corporation and Fredricks Development Corporation are without jurisdiction here since they did not preserve *any* Due Process claim in the California courts, and petitioner Pacific Lighting asks this Court to answer questions far different than the lone point it presented to the California Court of Appeal.

In addition, the record in this case is terrible on any Due Process issue. Petitioners did not object to the punitive damage jury instruction that was given. They may even have proposed it. The record is barren on this point. Petitioners Dunn and Fredricks, who never raised the issue prior to this Court, affirmatively kept out evidence at trial (such as financial information concerning their net worth and income) that would be relevant to a Due Process claim. Nor is there any record of the adequacy of the process California provides to a defendant since petitioners never asserted their rights under California law to attack the punitive damage verdict.

Nor should this case be held pending decision in Pacific Mutual Life Ins. Co. v. Haslip, 110 S. Ct. 1780 (1990). On the merits, California law on the assessment of punitive damages does not raise the same Due Process concerns as are presented by the law of Alabama before the Court in Haslip. California requires a relationship between actual harm and the amount of punitive damages assessed, precludes punitive damages based upon *respondeat superior* except where a managing agent is involved, and requires a proof of malice, fraud, or oppression by clear and convincing evidence. After trial, the judge who presided sits as a thirteenth juror and must reduce the punitive damages if, in his "independent judgment", they are excessive. On appeal

there is a further review for excessiveness. Whether Due Process is determined by contemporary standards or by reference to prevailing law at the time of adoption of the Fourteenth Amendment, this scheme provides all the protections due to petitioners.

II. STATEMENT OF THE CASE.

A. Statement Of Facts.

The facts are set forth in some detail in the California Court of Appeal decision, and will not be repeated here. MGW will only note that petitioners soft-pedal the essence of the factual findings against them that support the verdict. The gist of the matter is that the jury found by clear and convincing evidence that the defendants conspired to cheat MGW of a brokerage commission by concocting a fictional account[1] of how they became involved in the deal that they eventually consummated.

The case went to the jury under the 1987 amendments to the California punitive damages statute. In fact, it was one of the first cases tried under the new law. Those amendments required the jury to find by clear and convincing evidence either fraudulent, malicious, or oppressive conduct in order to award punitive damages.

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[1] MGW had brought the property to Fredricks' attention. However, Fredricks refused to pay MGW a commission on the ground that Dunn, its joint venture partner, was already working on the deal. The evidence at trial also established that Dunn had refused to pay a commission to its broker on the ground that Fredricks had located the property. The result was that even though, either way, a brokerage commission was due someone, none was paid.

The actual damages awarded in this case are $773,200.00.[2] The punitive damages assessed against Pacific Lighting, $800,000, are only slightly higher than the actual damages. In fact, the jury tailored the punitive damage award to the individual defendants found to have cooperated in the scheme, assessing awards of $-0-, $400,000, $800,000, and $800,000 against the various defendants based upon their differing culpabilities.

B. The Federal Issue.

Petitioners simply have not preserved either the issue they now present, or the record that would support their position. The following chronology brings some perspective to the matter:

1. At no time was a federal issue raised by *anybody* at the trial court level.

2. On appeal, petitioners Dunn and Fredricks, who were seeking reversal of the judgment against them, did not raise at any point a federal issue.

3. After Dunn and Fredricks had failed to assert a federal issue in their brief, Pacific Lighting (represented by different counsel), which was seeking to uphold the judgment in its favor (the verdict against it having been vacated by the trial judge), argued in support of the defense judgment that the California scheme for assessment of punitive damages violates Due

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[2] Petitioners state that the compensatory damages were $558,000. This is incorrect on two counts. First, the amount of actual damages found by the jury was $585,000, not $558,000. In addition, the jury also found that an additional $185,200 was due as prejudgment interest, considered compensatory damages under California law. Harsany v. Cessna Aircraft Co., 148 Cal. App. 3d 1139, 1142, 196 Cal. Rptr. 374 (1983). Petitioners' statement of facts thus makes it appear that the ratio of punitive to actual damages was larger than, in fact, it was.

Process *because it does not set a ceiling in advance on the amount of punitive damages that can be assessed.*[3] See Appendix D to the Petition For Certiorari. This argument was rejected summarily.[4]

Pacific Lighting also asserted (albeit on state law grounds) that the punitive portion of the judgment could not stand because the jury had not been adequately instructed concerning the standards for imposition of punitive damages. The Court of Appeal refused to reach this issue since it had been waived by the failure to raise the issue at trial:

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[3] Pacific Lighting argued:

> Thus, although due process clearly permits sentencing authorities, whether judges or juries, considerable leeway in determining the appropriate level of punishment to be imposed in a particular case, such discretion is exercised only where its outer limits previously have been circumscribed and publicized. Once such limitation has been established, the maximum potential punishment for any given offense is readily ascertainable, and the amount of punishment actually imposed may be constrained by the Eighth Amendment....
>
> As a result, Pacific Lighting essentially was at the mercy of an uncontrolled jury which could impose any amount of punitive damages, no matter how outrageous, without the threat of judicial censure.

The contention of Pacific Lighting, far from arguing that standards were required below the ceiling, in fact acknowledged that considerable discretion exists as to the amount of punitive damages assessed.

[4] The Court made only the following cursory comments:

> Finally, it argues the award of punitive damages is supported by insufficient evidence, and punitive damages are unconstitutional. However, there is sufficient evidence in the record to support the award, and punitive damages are constitutional under the Eighth Amendment (Browning-Ferris v. Kelco Disposal, 109 S. Ct. 2909, 2912 (1989)), and the due process provision of the Fourteenth Amendment (Bertero v. National General Corp., 13 Cal. 3d 43, 66, fn. 13 (1974); Zhadan v. Downtown L.A. Motors, 66 Cal. App. 3d 481, 501-502 (1976); but see Pacific Mut. Life Ins. Co. v. Haslip (Ala. 1989) 553 So. 2d 537, 543, Cert. granted April 2, 1990, 1990 U.S.L.W. 15078, No. 89-1279).

> Pacific Lighting argues the court failed to properly instruct the jury as to the prerequisites for awarding punitive damages. But Pacific Lighting never asked for such instruction and thus any error on this point was waived. (Petition For Certiorari, App. A, p. 11a)

In light of the argument advanced by Pacific Lighting, the Court of Appeal opinion must be construed as saying: "We reject Pacific Lighting's contention that punitive damages are unconstitutional because there is no maximum limit set in advance." There is nothing in the opinion which discusses or decides what standards are required for punitive damages to be imposed.

III. THE PETITION AS TO DUNN AND FREDRICKS MUST BE DENIED FOR FAILURE TO PRESERVE ANY DUE PROCESS CLAIM IN THE CALIFORNIA COURTS.

A. Dunn And Fredricks Never Raised A Due Process Issue At Trial Or On Appeal.

Dunn and Fredricks did not raise the constitutional issue in the trial court. They did not raise it in the California Court of Appeal. No California court has addressed the Dunn and Fredricks Due Process claim. There is simply no *jurisdiction* under 28 U.S.C. section 1257 for Dunn and Fredricks to be in this Court. Dunn and Fredricks' failure to comply with valid California appellate procedure provides an adequate and independent state ground for decision. Board of Dirs. of Rotary Inter. v. Rotary Club, 481 U.S. 537, 550 fn. 9 (1987) [where issue first raised on rehearing petition to California Court of Appeal, which was denied, after which the California Supreme Court denied review, this

Court would not reach issue], see also, Hoover v. Ronwin, 466 U.S. 558, 574, fn. 25 (1983).

B. Dunn And Fredricks Cannot Come Into This Court On Pacific Lightings' Coattails.

Dunn and Fredricks do not contest their failure to raise the issue before the California courts. Instead, they assert that since Pacific Lighting raised a Due Process claim, which was addressed, they are entitled to redress here.[5]

Dunn and Fredricks should not be allowed to take advantage of the totally fortuitous fact that the judgment in Pacific Lighting's favor was reversed. There can be no question that, had the judgment in Pacific Lighting's favor been upheld, Pacific Lighting would have nothing to petition this Court about. Even if the judgment had been reversed, and the matter had been remanded for a new trial[6], Pacific Lighting would have had no basis to bring the non-final case here.

In either of those events, Dunn and Fredricks would have been in the procedurally indefensible position of petitioning this Court for certiorari where neither they, nor any other certiorari petitioner, had even remotely preserved the federal issue. The happenstance that Pacific Lighting's judgment became final for certiorari purposes at the same time as did the Dunn and Fredricks judgment should not entitle Dunn and

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[5] Even if Dunn and Fredricks were entitled to the same consideration as is Pacific Lighting, certiorari should be denied for all of the reasons discussed infra in connection with Pacific Lighting.

[6] The trial judge granted a new trial motion in Pacific Lighting's favor, conditional on the reversal of the j.n.o.v. In conformity with California practice, if the j.n.o.v. is reversed, then the new trial order is effective and a retrial takes place (unless, of course, the new trial order is also reversed as was the case here).

Fredricks to greater rights before this Court than they themselves preserved.

Dunn and Fredricks excuse their failure to preserve any Due Process issue only briefly in a footnote[7]. The essence of their position is that they should be treated exactly the same as Pacific Lighting. But throughout this litigation, they occupied very different positions from Pacific Lighting. Where Pacific Lighting sought affirmance of a judgment in its favor, Dunn and Fredricks sought reversal of the judgments against them, and were therefore far more *restricted* in the arguments they could advance on appeal. They have been represented on appeal by separate counsel, and have urged different arguments before the California appellate courts. Each of these parties should be judged individually based on the merits of each party's position.

Dunn and Fredricks' argument to the contrary is based upon a number of silent assumptions that do not survive scrutiny:

Assumption 1 - That, under California law, the objection of one party can inure to the benefit of another. The opposite is the case. A party is not entitled to rely on the objection of a co-party. People v.

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[7] They state: "Although petitioners Dunn and Fredricks did not raise a federal due process challenge to the punitive damage award in the Court of Appeal, Pacific Lighting's challenge necessarily placed the entire punitive damage award in constitutional jeopardy. Furthermore, as indicated by the Court of Appeal's opinion in this case, see App. A. infra, 12a, the Supreme Court of California unequivocally has rejected both federal and state due process attacks on that State's vague and open-ended punitive damage system. Under these circumstances, it was not necessary for Dunn and Fredricks to raise such issues in the trial court or Court of Appeal as a matter of state law. See, e.g., Moradi-Shalal v. Fireman's Fund Insurance Companies, 46 Cal. 3d 287, 292, 250 Cal. Rptr. 116, 758 P.2d 58 (1988) (defendant was not required to raise issue in the lower courts because "clearly it would have been pointless for defendant to urge either the trial or appellate court to overrule one of our decisions")."

Jacobs, 195 Cal. App. 3d 1636, 1656, 241 Cal. Rptr. 550 (1987) ["Owen's argument fails for another, and more fundamental, reason: it was Jacobs and not he that objected to the reenactment. 'On appeal, a defendant cannot taken advantage of the objections made by a codefendant in the absence of a stipulation or understanding to that effect.' [Citations.] Owen's failure to personally object waived any claim of error that might be heard to make. [Citations.]"]. See also, People v. Brown, 110 Cal. App. 3d 24, 35, 167 Cal. Rptr. 557 (1980); People v. Wright, 216 Cal. App. 2d 866, 871 (1963); People v. Adame, 169 Cal. App. 2d 587, 599, 337 P.2d 477 (1959) Cert. denied 361 U.S. 969 (1960); People v. Duran, 57 Cal. App. 2d 363, 370, 134 P.2d 305 (1943).[8]

Assumption 2 - That Pacific Lightings' argument placed the award against Dunn and Fredricks in "constitutional jeopardy". However, factually, Pacific Lighting's challenge in the Court of Appeal[9] did not

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[8] The California rule follows the general rule that co-party objections are insufficient to preserve an issue. See 4 C.J.S. Section 251, and cases cited therein ["If several parties are entitled to make an objection, and it is made by any number less than all, it does not inure to the advantage of the party or parties not joining in it."]; Osterneck v. E.T. Barwick Industries, Inc., 825 F.2d 1521, 1533 (11th Cir. 1987) ["One may not rely on the objections made by co-parties to the action, but, rather must expressly adopt a co-parties' objection as his own."]; Kenney v. Lewis Revels Rare Coins, Inc., 741 F.2d 378, 382 (11th Cir. 1984) [co-party's objection insufficient to preserve issue].

[9] The Court of Appeal brief of Pacific Lighting states:

> This Court need not await such action, however, as the present case is one wherein the award of punitive damages clearly violates Pacific Lighting's right under both the Due Process and Excessive Fines Clauses of the Untied States Constitution. Despite this prohibition, however, the parameters for awarding punitive damages have not yet been statutorily enunciated, an omission which, perforce, has resulted in a violation of Pacific Lighting's due process rights....As a result, Pacific Lighting essentially was at the mercy of an uncontrolled jury which could impose any amount of punitive damages, no matter how outrageous, without the threat of judicial censure. (App. D. p. 19a-20a of Petition For Certiorari.)

even attempt to place the punitive award against Dunn and Fredricks in "constitutional jeopardy", but instead asserted only its own Due Process rights[10] in an effort to protect the judgment in its favor.

Assumption 3 - That assertion of a Due Process issue by Pacific Lighting could overcome the *jurisdictional* bar against Dunn and Fredricks. Failure to adequately preserve an issue may result in consider-ation being denied here for either prudential *or* jurisdictional reasons. Where only prudential consider-ations apply, countervailing prudential considerations, such as those advanced by Dunn and Fredricks, may militate in favor of review. But where, as here, jurisdiction is lacking, prudential arguments are irrelevant.

28 U.S.C. section 1257 requires that a litigant preserve an issue in the highest state court in which review may be had in order for there to be jurisdiction on certiorari. Street v. New York, 394 U.S. 576, 581-2 (1969). As Street recognizes, where the state court has not decided a federal issue, "it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary. [Citations.]" See also, Cox v. Texas, 202 U.S. 446 (1906) [failure of state appellate court to reach issue presumed to result from failure to raise issue in trial court].

This court has never held that a party which has utterly failed to preserve a federal issue in state court

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These passages make clear that Pacific Lighting was seeking only to assert its own due process rights, not those of Dunn and Fredricks.

[10] As has been noted by this Court on numerous occasions, which are discussed infra, constitutional rights are personal and must be asserted by the party whose rights have been violated.

may, nonetheless, seek relief here on a showing that assertion of the federal issue in state court would have been futile. Preservation of the issue is jurisdictional, much like a notice of appeal. One who fails to appeal is subject to the judgment, even though a co-party successfully appeals on an issue equally applicable to the non-appealing party.

Assumption 4 - Dunn and Fredricks assume that, because Pacific Lighting was allowed to raise a Due Process issue for the first time on appeal, they would have been as well. They are wrong. Pacific Lighting was entitled to raise the issue because it was seeking affirmance of the judgment in its favor. Dunn and Fredricks, who were seeking reversal, would not have been so entitled.

The California courts allow a party to assert on appeal arguments not preserved below where the argument is asserted to *support* the judgment. In Davey v. Southern Pacific Co., 116 Cal. 325 (1897), the California Supreme Court stated:

> "The respondent is at liberty to suggest any ground that he may choose to show that the ruling was right, whether advanced in the discussion below or not. If the testimony had been admitted, and Clark had appealed, he would have been required to confine himself to objections specifically taken at the trial and stated in the record. The distinction is between the case of a party seeking to reverse a judgment and that of a party resisting the attempt." Id. at 331

This rule has been consistently followed by the California courts. Green v. Superior Court, 40 Cal. 3d 126, 138, 219 Cal. Rptr. 186, 707 P.2d 248, 219 (1985) Cert. denied 475 U.S. 1087 (1986) [affirming on ground not raised below, recognizing different rule where reversal sought, citing Davey]; Philip Chang & Sons Associates v. La Casa Novato, 177 Cal. App. 3d 159, 173, 222 Cal. Rptr. 800 (1986) [if evidence objectionable on any ground, case will be affirmed, even if ground not raised below].[11]

The requirement that issues be squarely raised below fills the critical function of allowing the state court to determine whether an adequate and inde-pendent state ground for decision exists. Webb v. Webb, 451 U.S. 493, 500 (1981). Here, because Dunn and Fredricks failed to raise a Due Process issue in the Court of Appeal, that Court could not decide whether California procedural rules barred them from asserting a Due Process issue. Therefore, jurisdiction here must rest on the dubious *assumption* that *if* the California Court had addressed the issue, it would have decided it on the *federal*, not the *state*, ground. Under Webb, this is impermissible.

IV. PACIFIC LIGHTING'S PETITION FOR CERTIORARI ALSO SHOULD BE DENIED.

Pacific Lighting's petition makes broad statements to the effect that Due Process challenges to punitive damage awards are of great interest to this Court, in effect lumping together all manner of possible Due Process claims related to punitive damages as though they constitute one undifferentiated question. The unstated contention is that this case is another Haslip

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[11] This Court follows the same practice. City of Revere v. Massachusetts General Hosp. 463 U.S. 239, 244, fn. 6 (1983); Dandridge v. Williams, 397 U.S. 471, 475, fn. 6 (1970). See Browning-Ferris Industries v. Kelco, ____ U.S. ____, 109 S. Ct. 2909, 2921, fn. 23 (1989).

clone that should simply be held pending decision in that case. In fact, this case is very different than Haslip. Nothing that could result from that case will be dispositive here.

Once one acknowledges that bare-bones jurisdiction to review one limited issue, the "ceiling" issue, does exist, there is nothing about Pacific Lighting's petition that can commend itself to this Court. In fact, the Pacific Lighting petition is drafted with a view towards making it into the "Haslip pile", rather than attempting to state a good case in its own right.

Pacific Lighting's approach seeks to avoid the serious problems with the record in this case. That record is largely barren as to what happened at trial since discussions concerning the punitive damage instruction were off the record. Certainly, no objection was preserved. Nor was any effort made by Pacific Lighting to invoke California protections against excessive punitive damage awards. This case, therefore, presents an attack against the California procedure whose workings are not disclosed by the record. What is more, despite the fact that this case has gone through the Petition For Certiorari, we still know virtually nothing about what it is that Pacific Lighting feels it is entitled to under the Due Process clause. While it clearly wants a ceiling (whether treble damages, a set dollar figure, a percentage of net worth, or any one of these, will do is not yet clear), what other "standards" it seeks are still unknown.[12]

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[12] Without question, Pacific Lighting desires as yet unspecified standards concerning the "conduct that may be punished" (Question presented). However, there is nothing in any brief in the California courts which remotely raises any issue concerning what "conduct that may be punished". What other standards, if any, Pacific Lighting is seeking here (as opposed to what was raised below), the certiorari petition leaves unstated.

For these reasons, the petition of Pacific Lighting should be denied forthwith, not be put aside to await Haslip.

A. The Record Is Inadequate.

In this case, there has been neither a factual record nor full and explicit consideration of the issue by the Court of Appeal. For example, many of the most important factual issues that could be relevant to a Due Process claim are absent from the record since the Due Process issue was not raised in the trial court. Primary among these is a good record concerning how and at whose instance the punitive damages instruction reached its final form[13] or the worth of the defendants in order to assess the propriety of the punishment.[14] Nor did any of the defendants assert by way of objection or otherwise in the trial court the Due Process protections to which they now feel entitled. That being

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Pacific Lighting seeks to camouflage the fact that it has changed arguments between the California Court of Appeal and here. The argument below was that as a substantive matter due process requires a maximum ceiling, set in advance. Here, the argument is advanced that California does not provide sufficient standards for the imposition of punitive damages. Petitioners seek to bridge the gap between the two arguments in two ways. First, they cut and paste the Pacific Lighting Court of Appeal brief to make it appear as though the issue was raised below, when it was not. Second, recognizing that the "ceiling" argument advanced below is woefully weak, they seek to transform the issue from whether or not a ceiling is required to what standards are required if there is no ceiling. However, the argument that there must be a ceiling is quite different than one which, assuming a ceiling is not constitutionally necessary, seeks other protections.

[13] MGW offered a punitive damage instruction, which was not given. The instruction that was given was the California form jury instruction, BAJI 14.71. Assumedly, a defendant requested the BAJI instruction which was given. Because the instant due process issue was not raised at that time, no one made any effort to preserve a record on the point.

[14] MGW requested information concerning the net worth of all of all of the defendants, to which the defendants objected with the result that only the annual report of Pacific Lighting was introduced into evidence.

the case, there is no way of knowing whether the trial court would have provided additional protections, or even whether MGW would have agreed to such protections in order to avoid a later Due Process challenge.[15] (Such an agreement is far from being far-fetched since MGW, in its closing argument to the jury, requested an assessment of $3,000,000 against all of the defendants. RT 1434/10-13.)

Strong policy reasons advise against consideration of the Pacific Lighting petition. This Court has made it abundantly clear that it will not decide issues concerning possible Due Process limitations on the award of punitive damages in a case which was not adequately presented to the state courts. In Bankers Life and Cas. Co. v. Crenshaw, 108 S. Ct. 1645, 1649-50 (1988), the petitioner had advanced in the Mississippi state court an argument that the punitive damage award against it violated federal Due Process. In this Court, Bankers Life against asserted a denial of Due Process, but changed the thrust of its argument. Where it had challenged the "chilling effect" of punitive damages in Mississippi, here it had attacked only the size of the award against it. Id. at 1649, n. 1. Therefore, this Court concluded that "these claims were not raised and passed upon in state court, and we decline to reach them here." Id. at 1649.

Likewise, in Browning-Ferris Industries v. Kelco Disposal, Inc., 109 S. Ct. 2909, 2921, the Court refused to reach the merits of a Due Process claim. There, the petitioner argued that the Due Process claim fell within the "clear intendment" of the points raised below. However, the Court, noting the issues preserved were

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[15] "To entitle objections to consideration here, they must be presented to the court below in the first instance, at least if they are of a kind which might have been there obviated." Houghton v. Jones, 68 U.S. 702, 705 (1863).

based upon the common law and the Eighth Amendment, "in the absence of a developed record on the issues relevant to this Due Process inquiry," refused to expand the inquiry to the Fourteenth Amendment, at least where reversal, rather than affirmance, was sought. Id., n. 23.

These decisions follow in the tracks of a long line of cases which demonstrate the reluctance of this Court to address important issues on inadequate records. For example, in Illinois v. Gates, 462 U.S. 213, 221 (1983), the Court had invited argument on whether the Fourth Amendment exclusionary rule should be relaxed where the police had acted in good faith. However, the Court ultimately decided that its request was improvident in light of the undeveloped record in the case:

> We have identified several purposes underlying the "not pressed or passed upon" rule...First, "[q]uestions not raised below are those on which the record is very likely to be inadequate since it certainly was not compiled with those questions in mind." [Citation.].... Here, for example, the record contains little, if anything, regarding the subjective good faith of the police officers that searched the Gateses' property--which might well be an important consideration in determining whether to fashion a good-faith exception to the exclusionary rule. Our consideration of whether to modify the exclusionary rule plainly would benefit from a record containing such facts. Id. at 221.

> Moreover, fidelity to the rule guarantees that a factual record will be available to us, thereby discouraging the framing of broad rules, seemingly sensible on one set of facts, which may prove ill-considered in other circumstances. Illinois v. Gates, 462 U.S. at 224.

See also, Morrison v. Watson, 154 U.S. 111 (1894).

DeBacker v. Brainard, 396 U.S. 28 (1969), presents a case quite similar to this one as regards the state of the record. The Court refused to reach the merits, stating:

> The record shows (1) that appellant did not make this contention before the juvenile court judge: (2) that appellant raised the issue in his habeas corpus petition but that it was not passed on by the Nebraska District Court; (3) that appellant did not press the District Court's failure to consider this issue in his appeal to the Nebraska Supreme Court, and made only passing reference to the issue in his brief to that court; and (4) that the opinions of the Nebraska Supreme Court, 183 Neb. 461, 161 N.W.2d 508 did not pass on the issue, nor even refer to the contention. Given the barrenness of the record on this issue, in the exercise of our discretion, we decline to pass on it. Id. at 32.

The record in this case is even less attractive than in these cases. It does not provide a good foundation for plenary review.

B. Pacific Lighting's Failure To Assert Its Rights Under California Law Renders It Impossible To Adjudicate Any Claim Concerning Adequate Standards.

California provides numerous protections to defendants in punitive damage cases. While Pacific Lighting may argue that those protections are not sufficient, it cannot, and does not, deny that they exist.

Those protections can be summarized as follows:

(1) At trial, the jury is instructed[16] that it may

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[16] The jury was instructed:

If you find that MGW suffered damage as a proximate result of any of the defendants' conduct on which you base a finding of liability, you may then consider whether you should award punitive damages against that defendant, or those defendants, for the sake of example and by way of punishment. You may in your discretion award such damages if, but only if, you find by clear and convincing evidence that said defendant was guilty of fraud or malice in the conduct on which you base your finding of liability.

Malice means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights of others.

A person acts with conscious disregard of the rights of others when it is aware of the probable economic consequences of its conduct and willfully and deliberately fails to avoid those consequences.

"Despicable conduct" is conduct which is so vile, base, contemptible, miserable, wretched or loathsome that it would be looked down upon by ordinary decent people.

Fraud means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal right or otherwise causing injury.

The law provides no fixed standards as to the amount of such punitive damages, but leaves the amount to the jury's sound discretion, exercised without passion or prejudice.

In arriving at any award of punitive damages, you are to consider the following: 1. The reprehensibility of the conduct of the defendant; 2. The

assess punitive damages only where it finds the defendant guilty of certain offenses.

(2) The jury must also find a mental element, "malice, fraud, or oppression", which are defined to the jury and which involve conscious wrongdoing.

(3) The jury may only assess punitive damages upon proof by clear and convincing evidence.

(4) A corporation may be assessed punitive damages only upon a finding that a managing agent of the corporation was guilty of the wrongdoing.[17]

(5) The jury is instructed that the amount of punitive damages must bear a reasonable relationship to actual harm. Gagnon v. Continental Cas. Co., 211 Cal. App. 3d 1598, 1603, 260 Cal. Rptr. 305, 307 (1989).

(6) The jury is instructed that the damages should be of an amount sufficient to deter and punish.

(7) After the verdict, the jury award is reviewed by the judge, sitting as a thirteenth juror, who must reduce the award if, in his "independent judgment", it

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amount of punitive damages which will have a deterrent effect on the defendant in the light of defendant's financial condition; 3. That the punitive damages must bear a reasonable relation to the actual damages.

If you find that MGW is entitled to an award of punitive damages against defendant, you shall state the amount of punitive damages separately in your verdict. CT 876-7.

17 No such instruction was given in this case because none was requested. However, there is no question but that Hunter, the actor for Pacific Lighting, was a managing agent. Moreover, the Court of Appeal held that the failure to request the instruction constituted a waiver of the claim. The United States Supreme Court will not consider the claim under such circumstances. See, e.g., Henry v. State of Mississippi, 379 U.S. 443 (1965).

is excessive.[18]

(8) On appeal, the award again is reviewed for excessiveness.[19] See, e.g., People v. Grocers Wholesale Co., 214 Cal. App. 3d 498, 514, 262 Cal. Rptr. 689, 699

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[18] "[T]he trial court, in ruling on the [new trial] motion, sits not in an appellate capacity but as an independent trier of fact." Neal v. Farmers Ins. Exch., 21 Cal. 3d 910, 933, 148 Cal. Rptr. 389, 402, 582 P.2d 980 (1978). California Code of Civil Procedure section 662.5 provides for the trial court to issue a remittitur "of so much [of the verdict] as the court in its independent judgment determines from the evidence to be fair and reasonable".

That due process can be satisfied by review by judges of a jury verdict is established by Clemons v. Mississippi, ____ U.S. ____, 110 S. Ct. 1441 (1990). The Court held that the Fourteenth Amendment does not require that the death penalty be imposed by the jury, and that the state courts could impose the death penalty by applying a constitutionally permissible standard even after a jury had returned a verdict of death under erroneous instructions. While factually and procedurally Clemons presents a very different case from this one, Clemons establishes that due process is not offended by a scheme which, when taking into account independent review by judges after return of the verdict, offers sufficient protections to meet due process, even if the process afforded through return of the verdict is, standing alone, constitutionally insufficient.

See also, Schall v. Martin, 467 U.S. 253, 280-1, 104 S. Ct. 2403 (1984) [procedures for review of detention determination "provide a sufficient mechanism for correcting on a case-by-case basis any erroneous detentions ordered under Section 320.5(3). Such procedures may well flesh out the standards specified in the statute."], Huron Valley Hosp., Inc. v. City of Pontiac, 887 F.2d 710 (6th Cir. 1989); Newberger v. United States Marshals Service, 751 F.2d 1162, 1167 (11th Cir. 1985); Creative Environments, Inc. v. Estabrook, 680 F.2d 822, 833 (1st Cir. 1982), cert. denied 459 U.S. 989; Bossetta-Goodman v. Datacom Systems Corp., 644 F.S. 354, 358 (E.D.La. 1986), affirmed 820 F.2d 1222; Groves v. Cox, 559 F.S. 772 (E.D.Va. 1983).

[19] Petitioners lay great stress on the "passion and prejudice" standard which is applied in California, albeit in a greatly modified form. (Where the appellate court finds the award excessive, "it is presumptively the result of passion and prejudice, and cannot be sustained." People ex rel. Dept. of Transportation v. Grocers Wholesale Co., 214 Cal. App. 3d 498, 262 Cal. Rptr. 689 (1989). In essence, the size of the award is the controlling factor.) However, even petitioners acknowledge that the standard applies "on appeal" (Petition For Certiorari, p. 11). They ignore entirely the non-deferential review of the trial judge. In essence, their argument is that due process precludes application of the "passion and prejudice" standard on appeal even though the "independent judgment" standard applies to the trial judge.

(1989); Dumas v. Stockter, 213 Cal. App. 3d 1262, 262 Cal. Rptr. 311, 314 (1989); Wollersheim v. Church of Scientology, 212 Cal. App. 3d 872, 906, 260 Cal. Rptr. 331, 353 (1989), cert. denied 110 S. Ct. 1937; Kaye v. Mount La Jolla Homeowners Ass'n., 204 Cal. App. 3d 1476, 1492-93, 252 Cal. Rptr. 67, 77 (1988).

MGW believes that this system fully comports with Due Process. However, if this Court is inclined to pass judgment on the California system, it should at least do so in a case where the record discloses how the system worked at each step of the way. The State of California is owed at least that much. This case does not do that because Pacific Lighting failed to invoke its rights under California law, both at trial and, more importantly, after trial and on appeal. It has never sought reduction of the punitive damage award on excessiveness grounds.[20] The burden is upon *it* to demonstrate that the state remedy is not adequate, not upon MGW to prove its adequacy. Huron Valley Hosp., Inc. v. City of Pontiac, 887 F.2d 710, 716 (6th Cir. 1989). Certainly, petitioners cannot sustain their burden of demonstrating that California procedure fails to meet Due Process requirements on the existing record.

Pacific Lighting's petition to this Court ignores the fact that, in determining whether the California system provides Due Process, the *entire* system must be examined. That system does not come grinding to a halt upon the reading of the verdict. Pacific Lighting cannot freeze this case in time, ignoring available post-trial and appellate remedies.

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[20] Pacific Lighting states: "The Court of Appeal did not engage in any apparent analysis of the amount of the award." [p. 9, Petition For Certiorari.] The reason is that it never asked it to.

Parratt v. Taylor, 451 U.S. 527 (1981), *overruled on other grounds*, Daniels v. Williams, 474 U.S. 327 (1986),[21] is instructive here. In that case, a convict whose hobby supplies were lost by prison officials through their failure to follow normal prison procedures for handling in-coming mail, alleged that he had been deprived of his property in violation of Due Process. Even assuming that a deprivation had occurred, the Court found that showing a deprivation is not enough; the deprivation had to be without Due Process of law. Therefore, it was necessary to evaluate the entire system, not just part of it up through a particular point in time. The fact that the convict had not availed himself of procedures to compensate him for the loss did not allow him to bootstrap himself into a Due Process claim as though those procedures did not exist:

> Moreover, the State of Nebraska has provided respondent with the means by which he can receive redress for the deprivation....This procedure was in existence at the time of the loss here in question *but respondent did not use it*. [Emphasis added.] Id. at 544-5.

Pacific Lighting did not pursue its California post-verdict remedies. Had it done so, this Court at least would know how California treated Pacific Lighting's claim, and would have the considered judgment of the California courts on whether the award should have been reduced and why.

Instead, if certiorari is granted, the parties' theoretical discussion concerning what California courts would have done with this case will have to substitute for a record showing how the California protections

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[21] Parratt had assumed that a negligent act could give rise to a Section 1983 action. Daniels overruled Parratt on this point.

actually operated in *this* case. This Court does not sit to render its best guess as to what California would have done, but to decide cases based upon an adequate record squarely setting forth the constitutional issue. This is not such a case.

C. Failure To Have Objected In The Trial Court Precludes Consideration By This Court.

In City of Springfield, Mass. v. Kibbe, 480 U.S. 257 (1987), the petitioner sought reversal of an award against it. It had not, however, objected to the jury instruction on which it was based. Despite the fact that the Court of Appeals addressed the issue, this Court declined to do so where no objection had been lodged in the trial court:

> The Dissent argues that we need not concern ourselves about Springfield's failure to preserve this issue, because it was passed on by the Court of Appeals below. Dissent, at 1118-9. There is doubtless no jurisdictional bar to our reaching it, whether or not the Court of Appeals did so. [Citation.] We think, however, that there would be considerable prudential objection to reversing a judgment because of instructions that the petitioner accepted, and indeed itself requested. Id. at 1116.

See also, United States v. Atkinson, 297 U.S. 157, 159 (1936); Beckley Newspapers Corp. v. Hanks, 389 U.S. 81, 82 (1967).

As is discussed above, Pacific Lighting did not object to the instruction given, one that differed from the one that MGW proposed and which, therefore, could well have been modified at Pacific Lighting's request. Any doubt on the issue must be resolved against Pacific

Lighting which bears the burden to bring to this Court a record that affirmatively supports its right to relief. Cunningham v. Springer, 204 U.S. 647 (1907) [Court would not assume error where not affirmatively shown from the record], Texas & P. Ry. Co. v. Volk, 151 U.S. 73 (1894) [request for additional instruction not presumed -- must appear from record]. In fact, under the authority of Kibbe, the Seventh Circuit has rejected a challenge to a punitive damage instruction for failure to have objected at trial. Williamson v. Handy Burron Mach. Co., 817 F.2d 1290, 1295 (7th Cir. 1987). See also, Mairena v. Foti, 816 F.2d 1061, 1064, fn. 2 (5th Cir. 1987).

Therefore, Pacific Lighting's failure to have objected at trial requires denial of its petition.

D. There Is No Jurisdiction To Consider Any Issue Not Raised In The Court Of Appeal.

Pacific Lightings' effort to present to this Court any issue other than the "ceiling" argument it presented to the Court of Appeal raises a jurisdictional defect as well. It simply is not allowable for a litigant to raise one Due Process argument in state court[22], and then

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[22] Pacific Lighting also apparently contends, despite Board of Dirs. of Rotary Inter. v. Rotary Club, 107 S. Ct. 1940, 1948, fn. 9 (1987) to the contrary, that its petition for discretionary review to the California Supreme Court could preserve new issues even though its petition was denied.

For this startling proposition, Pacific Lighting again relies on unstated premises that are simply unsupportable. First, Pacific Lighting contends that California appellate procedure did not require it to assert those issues prior to a petition for discretionary review to the California Supreme Court, despite clear California case law to the contrary. Estate of Leslie, 37 Cal. 3d 186, 202, 207 Cal. Rptr. 561, 689 P. 2d 133 (1984); Franz v. Board of Medical Quality Assurance, 31 Cal. 3d 124, 143, 181 Cal. Rptr. 732, 642 P. 2d 792 (1982); Imperial Valley L. Co. v. Globe G. & M. Co., 187 Cal. 352, 359, 202 P. 129 (1921); CNA Casualty of California v. Seaboard Surety Company, 176 Cal. App. 3d 598, 618, 222 Cal. Rptr. 276 (1986).

In order to overcome the ordinary rules of appellate procedure, Pacific Lighting argues that a new rule, overruling sub silentio decades of California cases, was announced in a footnote in Moradi-Shalal v. Fireman's Fund Insurance Companies, 46 Cal. 3d 287, 250 Cal. Rptr. 116, 758 P. 2d 58 (1988). In that case, the California Supreme Court did consider an issue that had not been squarely raised where that issue was necessary for proper resolution of the issue that had been properly raised, and where overruling of one of its past decisions was required.

Moradi-Shalal does not purport to establish a new rule. To the contrary, Moradi-Shalal simply follows the California rule that an appellate court can in its discretion waive non-preservation of an issue if the matter "presents a pure question of law on undisputed evidence regarding either a noncurable defect of substance, such as a lack of jurisdiction or complete failure to state a cause of action, or a matter affecting the public interest or the due administration of justice." CNA Casualty of California v. Seaboard Surety Company, 176 Cal. App. 3d 598, 618, 222 Cal. Rptr. 276 (1986). However, there is no such waiver here. (In fact, any such waiver would conflict with another rule of California appellate procedure, that constitutional issues are waived if not raised at the earliest opportunity. In re Marriage of Benjamin S., 171 Cal. App. 3d 738, 745, 217 Cal. Rptr. 561 (1985); Selleck v. Globe International, 166 Cal. App. 3d 1123, 1133, 212 Cal. Rptr. 838 (1985); Geftakys v. State Personnel Bd., 138 Cal. App. 3d 844, 864, 188 Cal. Rptr. 305 (1982) ["It is the general rule applicable in civil cases that a constitutional question must be raised at the earliest opportunity or it will be considered as waived."].

Be that as it may, Pacific Lighting next asserts that it falls within the new rule of Moradi-Shalal since the issues it raises here would have required overruling of Bertero v. Nation General Corp., 13 Cal. 3d 43, 118 Cal. Rptr. 184, 529 P.2d 608 (1974). In fact, the decision in Bertero is not nearly as broad as Pacific Lighting assert. While a footnote (Id. at 66, n.13) in Bertero does reject a "constitutional" attack on the California punitive damage statute, the opinion (1) does not indicate whether the "constitutional" issue is based on the California or Federal constitution, (2) is limited to a vagueness challenge, and (3) challenged a statute very different in form from the substantially amended statute in issue in this case. (For example, one of the main claims of Pacific Lighting is that the instruction that the jury must find "despicable" conduct is too vague to satisfy Due Process. (Petition For Certiorari, p. 10) That instruction, however, was mandated by the recent California Tort Reform Act, and was not contained in any of the jury instructions that were before the California courts in Bertero.)

That Bertero is limited in scope is demonstrated by Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981). There, the Court considered a contention that the lack of "fair warning" that the defendant's conduct would subject it to punitive damages violated due process. (Pacific Lighting likewise asserts that it had no warning that its conduct could be subjected to punitive damages because the case arose from contract, in which punitive damages are unavailable. Petition, p. 8-9.) The defendant in Grimshaw lost not because such an argument was

make a very different Due Process argument here. This Court has long required that the issues presented here have been *squarely* presented to the court below, particularly where the litigant seeks to overturn, rather than support, the judgment. Browning-Ferris Industries v. Kelco, ___ U.S. ___, 109 S. Ct. 2909, 2921, fn. 23. (1989); Bankers Life and Cas. Co. v. Crenshaw, ___ U.S. ___, 108 S. Ct. 1645, 1649-50 (1988).

E. Pacific Lighting's Contention Constitutes An Impermissible Facial Attack On The California Scheme.

Pacific Lighting's federal claim constitutes a facial attack on the California scheme for imposing punitive damages. Pacific Lighting does *not* argue that the *actual* amount of punitive damages assessed against *it* is

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unavailable, but because the Court found that the defendant in fact had fair warning from California case law predating the conduct.

Therefore, even if Moradi-Shalal is the revolution in California appellate procedure that Pacific Lighting believe it to be, since the Bertero footnote does not completely resolve all due process issues, it fails to provide the underpinning that Pacific Lighting requires.

In addition, Bertero predates Bankers Life and Browning-Ferris. There can be no certainty that, in light of the statements by various members of this Court, California appellate courts would not have expanded due process protections, or expanded the common law protections in order to avoid the constitutional question.

Finally, whether Moradi-Shalal establishes a new rule is irrelevant here. This Court requires that the issue have been preserved below. If the California Supreme Court had granted review to Pacific Lighting and decided the additional due process arguments, jurisdiction might well exist here to consider them. But it did not. This Court's practice recognizes that where a lower court considers an issue advanced by a party in the face of valid procedural rules, the issue may be pressed here. But where the lower courts have not waived compliance with their own rules, review here is barred. Beecher v. Alabama, 389 U.S. 35, 37 (1967) ["In any event, since the state court deemed the federal constitutional question to be before it, we could not treat the decision below as resting upon an adequate and independent state ground even if we were to conclude that the state court might properly have relied upon such a ground to avoid deciding the federal question"], State v. Brand, 303 U.S. 95, 99 (1938).

violative of Due Process.[23] In essence, its argument is: Even though I have no cause for complaint, since someone else might have, the award against me cannot stand.[24] Such arguments are routinely rejected by the Court.

In Broadrick v. Oklahoma, 413 U.S. 601 (1973), the Court stated the general rule against litigants making facial attacks of unconstitutionality when they themselves have no cause for complaint, though others might:

> Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court. [Citations.] A closely related principle is that constitutional rights are personal and may not be asserted vicariously. These principles rest on more than the fussiness of judges. They reflect the conviction that under our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws. Constitutional judgments, as Mr. Chief Justice Marshall recognized, are justified only out of the necessity of adjudicating rights in particular cases.... Id. at 610-11

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[23] This is hardly surprising, given that the punitive damage awards are not in any sense disproportional to the actual damages assessed. It is, nevertheless, fatal to Pacific Lighting's claim.

[24] Assumedly, every California litigant assessed punitive damages is likewise entitled to avoid them irrespective of the size of the award or the facts of the case.

See also, Caplin & Drysdale, Chartered v. U.S., 109 S. Ct. 2646, 2657 (1989) [the fact that the statute in issue *could* be abused in some other case did not allow the appellant to assert the issue], Bd. of Trustees of State Univ. of N.Y. v. Fox, ___ U.S. ___, 109 S. Ct. 3028, 3037 (1989), Bankers Life and Cas. Co. v. Crenshaw, 486 U.S. 71 at fn. 6 (1988).[25]

F. Even If The Merits Were Reached, Pacific Lighting's Case Is Weak.

1. Pacific Lighting's contention that Due Process requires a ceiling or limit on the amount that can be assessed is meritless.

Pacific Lighting argues that the award against it cannot stand because there was no ceiling on the amount that could be assessed against it. This argument is meritless.

The contention of petitioners *has* been passed upon by this Court. In Standard Oil Co. v. Missouri, 224 U.S. 270 (1912), Standard Oil contended that the civil penalty imposed upon it denied it Due Process "because there was no statute fixing a maximum penalty..." [Emphasis added.] Id. at 285. This Court rejected the contention since the penalty could be upheld on the theory of punitive damages. And in Louis Pizitz Dry Goods Co. v. Yeldell, 272 U.S. 112 (1927), this Court approved the constitutionality of a punitive damage award without a limit set in advance where the only protection was that the "finding of the jury is not to be

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[25] In Bankers Life, appellant argued that the imposition of a surcharge upon the amount of a judgment if unsuccessfully appealed would burden the access of litigants to the courts in violation of equal protection. The court noted that such a claim might well have merit as to others, but that since the appellant in the case before it had not demonstrated that its access to appeal had been foreclosed it had no standing to assert the issue.

disturbed unless the verdict is 'induced or reached on account of prejudice, passion, or other improper motive or cause.'" Id. at 114-5. These cases dispose of Pacific Lighting's ceiling contention.

Pacific Lighting's contention also ignores California common law developments in this area. For example, in People ex rel. Dept. of Transportation v. Grocers Wholesale Co., 214 Cal. App. 3d 498, 262 Cal. Rptr. 689 (1989), the California Court of Appeal surveyed punitive damages cases[26] and noted that generally such awards should not exceed 10% of the defendant's net worth absent unusual or egregious circumstances.[27]

2. Any conceivable error was harmless in any event.

Pacific Lighting's concern about the jury's possible imposition of "any amount of punitive damages, no matter how outrageous" was satisfied by MGW's request in closing argument for an assessment of $3,000,000 against all of the defendants. RT 1434/10-13. In light of the amounts requested, any failure to have a maximum specified by the Court in advance was

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[26] See, Burnett v. National Enquirer, Inc., 144 Cal. App. 3d 991, 1011-12, 193 Cal. Rptr. 206, 218-19 (1983) [award equalling 29% of net worth excessive; reduced to 5.77% of net worth]; Little v. Stuyvesant Life Ins. Co., 67 Cal. App. 3d 451, 469-70, 136 Cal. Rptr. 653, 663-64 (1977) [award equalling 15% of net worth excessive; reduced to 1.5% of net worth]; Merlo v. Standard Life & Acc. Ins. Co., 59 Cal. App. 3d 5, 18, 130 Cal. Rptr. 416, 424 (1976) [award exceeding 30% of net worth excessive].

[27] Petitioners may argue that 10% of net worth is not enough protection since it sets no fixed limit. However, such a limit is enough to meet the requirement of due process. Alternative limits present greater problems than the one California applies. For example, a fixed multiple of actual damages (e.g., treble damages) would provide little notice of the defendant's exposure unless the actual damages are liquidated in advance, rarely the case in tort actions. A fixed dollar limit (e.g., $10,000) is in no way tailored to the individual wrongdoer. While a $10,000 award may be disastrous for a relatively poor defendant, it is meaningless to a large corporation.

harmless error since the defendants already had such a maximum. This case is similar to Bratt v. Western Air Lines, 169 F.2d 214, 216-7 (10th Cir. 1948). There, an instruction given concerning negligence was erroneous. However, the Court found that in light of the concessions made in plaintiff's closing statement, there was little likelihood that the instruction had affected the result. Accordingly, the judgment was affirmed.

3. Since the California punitive damage scheme comports with accepted common law principles concerning punitive damages at the time of the adoption of the Fourteenth Amendment, it is immune from Constitutional attack.

Burnham v. Superior Court of Cal., ___ U.S. ___, 110 S. Ct. 2105, 2115 (1990), presents another formidable obstacle to Pacific Lighting's attempt to obtain reversal of the judgment against them. In that case, a plurality[28] decision stated that, "'[A] process of law, which is not otherwise forbidden, must be taken to be due process of law, if it can show the sanction of settled usage both in England and in this country...'[quoting Hurtado v. California, 110 U.S. 516, 528-9, 28 L.Ed. 232, 4 S. Ct. 111 (1884)].

Punitive damages certainly were accepted law during the period in which the Due Process clause was adopted. Day v. Woodworth, 54 U.S. 363, 371 (1851). See, Smith v. Wade, 461 U.S. 30 (1983), Barry v. Edmunds, 116 U.S. 550 (1886), and therefore do not violate Due Process.

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28 Justice Scalia authored the opinion, and was joined by Justices Rehnquist and Kennedy. Justice White joined the opinion with respect to the portions of the opinion discussed below.

V. CONCLUSION.

This Court's job is hard enough deciding issues on their merits. In light of the serious jurisdictional and procedural problems here, there is simply nothing attractive about the prospect of addressing Due Process issues in this case. There is no unfairness to the petitioners, who have only themselves to blame for their failure to preserve a clean record.

This case is pregnant with those procedural shortcomings (lack of an objection at trial, lack of a record disclosing the functioning of the state system under attack, lack of considered and thorough state appellate court consideration) that present only broad, theoretical questions, rather than narrowly focused issues ripe for adjudication.

This case should be put into perspective. A trial was conducted in Orange County, California. At that trial, *no one* even hinted that the punitive damage instruction given in any way violated Due Process. Oblivious to any such concern, the case went to the jury and petitioners lost. Petitioners then had the right to seek a reduction in the punitive damage award from the trial judge, but for reasons known only to themselves declined to do so. Having failed at trial in any way to assert or preserve the Due Process issue complained of here, petitioners now come petition in hand to this Court. Neither equity nor prudence can justify disturbing the award at this stage.

Respectfully submitted,

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